(3)

Supreme Court, U.S.
FILED
AUG 25 1999
OFFICE OF THE CLERK

No. 99-114 -

In The

Supreme Court of the United States

ROBERT LOUIS QUALIA,

Petitioner,

v.

THOMAS M. QUALIA AND JOHN QUALIA,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The Fourth Court Of Appeals District Of Texas In San Antonio, Texas

REPLY TO BRIEF IN OPPOSITION

MOULTON S. DOWLER, JR.
Counsel of Record
SAMUEL H. BAYLESS
BART W. HUFFMAN
GRESHAM, DAVIS, GREGORY, WORTHY & MOORE
A PROFESSIONAL CORPORATION
112 East Pecan Street, Suite 900
San Antonio, Texas 78205-1542
Telephone No. (210) 226-4157
Facsimile No. (210) 226-5154
Attorneys for Petitioner Robert Louis Qualia

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

QUESTIONS PRESENTED

1. After Petitioner's answer to Respondents' lawsuit was struck by the trial court as a sanction for refusal to make discovery relating to the merits of Respondents' claim, did the subsequent refusal of the trial court to permit Petitioner to raise affirmative defenses (res judicata, limitations, etc.), which were unrelated to and could be determined without reference to the matter as to which discovery was not made, violate Petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution, in that no presumption of lack of merit of the affirmative defenses could arise from Petitioner's refusal to permit discovery as to unrelated matters, given that such a presumption is a requisite for striking a litigant's claim or defense for refusal to make discovery? *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

2. After Petitioner was granted leave to file affirmative defenses (res judicata, limitations, etc.), which were unrelated to and could be determined without reference to the matter as to which a prior discovery sanction had been imposed, did the striking of those affirmative defenses as a purported "reinstatement" of the earlier sanction violate Petitioner's right to due process under the Fifth and Fourteenth Amendments to the Constitution? *See id.*

ARGUMENT

The Petitioner, ROBERT LOUIS QUALIA, respectfully replies as follows to Respondents' Brief in Opposition to Petition for Writ of Certiorari:

1. Introduction

Although Respondents contend that Petitioner's due process arguments are "insidious," (Br. in Opp'n at 6), Respondents do not address the Petitioner's authorities. Instead, Respondents summarily pronounce, incorrectly, that "the matters which [Petitioner] states denied him due process never occurred," (*id.* at 4), and Respondents misstate the significant effect, upon the judgment finally entered, of the pre-trial and post-trial rulings below. (*See id.* at 2 ("Pre-trial and post-trial pleadings and orders are often of interest, but in this case there was a Judgment.").)

2. Petitioner's Affirmative Defenses To The Conversion Claim Were Raised With Leave Of Court But Then Were Struck Based On Unrelated Alleged Discovery Misconduct

Respondents repeatedly assert that the trial court never struck any of Petitioner's affirmative defenses. [Br. in Opp'n at 5 ("The District Court did not strike any affirmative defenses, . . .); *id.* at 6 (" . . . the District Court sustained and maintained the order of August 29, 1991, but otherwise administered no further sanctions . . . "); *id.* at 7 ("The trial court ultimately did not strike any affirmative defenses to any claims.").] In fact, the original, interlocutory sanctions order of August 29, 1991, *was* modified, and *Petitioner was permitted to raise his affirmative defenses to the conversion claim.* (*See* Pet. at 12-13.) The subsequent striking of those affirmative defenses to the conversion claim, (Order on M. To Reinstate Sanctions, Pet. at 46a-47a), based only on the

alleged unrelated conduct[1] for which he was originally sanctioned, is the crux of Petitioner's second Question Presented, which is whether the striking of the affirmative defenses was a violation of Petitioner's due process rights. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982); *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 351 (1909); *Hovey v. Elliott*, 167 U.S. 409 (1897). The only effect of the Order on Motion to Reinstate Sanctions was to strike Petitioner's affirmative defenses to the conversion claim.[2] A post-trial order that "reinstates" sanctions is a sanctions order, and, as such, must comport with due process.

3. The State Of Petitioner's Pleadings On August 29, 1991, Does Not Affect The Constitutional Violation

A. Petitioner's Affirmative Defense Of Res Judicata Based On The Take-Nothing Judgment In The County Court At Law Did Not Arise Until After The August 29, 1991, Sanctions Order

Respondents state that, on August 29, 1991, "[Petitioner's] failure to [raise affirmative defenses] was his choice" and that "when [Petitioner] suffered default judgment on the conversion claims against him, his lack of pleading of affirmative defenses was completely within his own control." (Br. in Opp'n at 2.) These statements are

---

[1] Petitioner asserts (and Respondents do not dispute) that the conduct is unrelated to his *affirmative defenses* to the conversion claim. Those affirmative defenses are res judicata, collateral estoppel, limitations, and improper collateral attack on the final orders of a probate court.

[2] Respondents state that Petitioner's "entire Petition to this Court is illusory," because Petitioner "was awarded judgment upon [his affirmative defenses]." (Br. in Opp'n at 3.) While the affirmative defenses were allowed (and sustained) as to other causes of action (not here in issue), they were not allowed to be presented with respect to the *conversion* claim, and Respondents obtained judgment in their favor and against Petitioner on that claim. (Pet. at 35a-41a.)

untrue, because it was not until *after* August 29, 1991, that Respondents brought identical claims – including conversion – against Petitioner in a separate lawsuit, suffered a take-nothing judgment on those claims, and did not appeal such judgment. (*See* Pet. at 3.) Pertinently, the Texas Supreme Court has stated,

> . . . if the second court has jurisdiction over the subject matter and the proper party does not file a dilatory plea in abatement in the second court at the proper stage, the second court can determine the issues before it and if it proceeds to judgment first, its judgment may have preclusive effect on the pending proceeding in the other court.

Mower v. Boyer, 811 S.W.2d 560, 563 n.2 (Tex. 1991) (holding that interlocutory judgment in first-filed lawsuit had no preclusive weight, but that subsequent, final judgment in second lawsuit would be given preclusive effect in first-filed lawsuit which had not proceeded to final judgment).

The affirmative defense of res judicata, which was not available as of the August 29, 1991, sanction order, is wholly dispositive of Respondents' conversion claim. It could not be struck, consistent with due process, as a "death penalty" sanction for unrelated discovery conduct. *See Bauxites*, 456 U.S. 694; *Hammond Packing*, 212 U.S. 322; *see also TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) ("Discovery sanctions cannot be used to adjudicate the merits of a party's claims *or defenses* unless a party's hindrance of the discovery process justifies a presumption that its claims *or defenses* lack merit." (emphasis added)).

B. On August 29, 1991, And Thereafter, Petitioner Was Entitled To Raise Affirmative Defenses As A Matter Of Right

Petitioner's answer as of August 29, 1991, was a general denial. But for the entry of the interlocutory default judgment, Petitioner would have retained the right to amend his answer, under Texas procedure, so as to raise affirmative

defenses, almost to the eve of trial.[3] Those affirmative defenses being unrelated to the conduct for which sanctions were imposed, a sanction which had the effect of denying Petitioner the ability to raise those defenses (regardless of whether the effect is characterized as striking defenses, or not allowing them to be raised) is a violation of Petitioner's right to due process.

4. Texas Procedure Cannot Be Invoked To Defeat Due Process Rights

When Petitioner's affirmative defenses were raised, "surprise" was the only possible basis, consistent with Petitioner's right to due process, for their exclusion. (*See* footnote 3, *supra*.) Because the affirmative defenses could be established without reference to any of the matters for which discovery had been sought by Respondents, "death penalty" sanctions for discovery abuse could not be levied on the affirmative defenses consistent with due process.

Yet, in the instant case, the interlocutory default judgment issued by the trial court on August, 29, 1991, operated to do just that. The Constitutional outcome should not be different because the trial court chose the procedural vehicle of an interlocutory "default judgment" in issuing discovery sanctions. Stated differently, if the entry of an interlocutory default judgment as a discovery sanction operates, under Texas law, to bar the later raising of affirmative defenses

---

[3] Petitioner retained the right to amend his pleading and assert affirmative defenses without leave of court at any time up to seven days of trial (or up to any alternative date set by the court in a pretrial conference), subject only to Respondents' right to move to strike an amended pleading on grounds of surprise. Tex. R. Civ. P. 63. Years before trial (and years before any pretrial conference), Petitioner asserted his then-available affirmative defenses of limitations and improper collateral attack on the final orders of a probate court, and filed amended pleadings asserting those defenses. (*See, e.g.*, Pet. at 97a-100a.) Respondents could not, and did not, argue that those defenses (much less the defense of res judicata, once it became available) operated as a "surprise" to them when raised.

unrelated to the discovery matter, then that procedure is, itself, violative of due process, and must yield under the Supremacy Clause of the United States Constitution to Petitioner's right to due process. U.S. Const. Art. VI cl. 2.

As this Court has held, "death penalty" sanctions comport with due process only if the sanctioned conduct supports a presumption of invalidity with respect to specific claims or defenses. *Bauxites*, 456 U.S. at 707 ("[T]he sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery."). The use of a case-ending procedural vehicle herein does not comport with this Constitutional mandate.[4] The issue, raised in Petitioner's first Question Presented, is particularly significant, and Petitioner respectfully submits that it should be addressed by this Court.

Respectfully submitted,

MOULTON S. DOWLER, JR.
Counsel of Record
SAMUEL H. BAYLESS
BART W. HUFFMAN
GRESHAM, DAVIS, GREGORY,
WORTHY & MOORE
A PROFESSIONAL CORPORATION
112 East Pecan Street, Suite 900
San Antonio, Texas 78205-1542
Telephone No. (210) 226-4157
Facsimile No. (210) 226-5154
Attorneys for Petitioner

---

[4] The cases cited by Respondents for the proposition that an interlocutory default judgment, as a matter of Texas law, bars all rights, "constitutional or otherwise, to file further answers or raise defenses," (Br. in Opp'n at 5), are all decided before the Texas Supreme Court implemented the present scheme of Constitutional standards for "death penalty" sanctions in *TransAmerican Natural Gas Corp. v. Powell*. In fact, the cases do not address the pertinent Constitutional issue, and they are further distinguishable on various grounds. However, for purposes of Petitioner's first Question Presented herein, Petitioner merely asserts that, if those cases represent the law in Texas, that law is unconstitutional or has been applied in an unconstitutional manner.